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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.R., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

D.R.,

Defendant and Appellant.

E069901

(Super.Ct.No. J270279)

OPINION

APPEAL from the Superior Court of San Bernardino County. Winston S. Keh,
Judge. Affirmed as modified.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Melissa Mandel, Tami Hennick
and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

On August 24, 2017, defendant and appellant D.R. (minor; born Aug. 2002) admitted to committing sexual battery on an unlawfully restrained person under Penal Code¹ section 243.4, subdivision (a) (count 5). As part of the plea agreement, the People dismissed counts 1 through 4, which had alleged four counts of committing a forcible lewd act upon a child under section 288, subdivision (b)(1) (counts 1, 2, 3, 4). The parties agreed that the court could consider the dismissed counts for purposes of disposition.

On November 28, 2017, minor was placed on probation with various terms and conditions. On January 25, 2018, minor filed a notice of appeal.

B. FACTUAL HISTORY²

In August and September of 2016, when he was 13 or 14 years old, minor sexually assaulted the victim³ on three separate occasions. In the first incident, minor approached the victim in the kitchen of minor's home. He walked up behind the victim, bent him over, pulled the victim's pants down, and inserted his penis into the victim's anus. Minor moved his penis back and forth for two minutes. On the second occasion, minor took the

¹ All statutory references are to the Penal Code unless otherwise specified.

² The factual background is taken from the probation report because minor admitted his offense.

³ The nine-year-old victim was the son of a caregiver employed in the home of minor's father.

victim into the garage of his house and put his penis inside the victim's mouth for approximately two minutes. The third incident occurred in the bedroom of minor's father. There, minor again forced his penis inside the victim's mouth. During the third incident, the victim tried to run away but minor grabbed the victim by the throat and forced his penis into the victim's mouth again. The victim, who was 4'8" tall and weighed 130 pounds, could not fight minor off because minor was more than a foot taller than the victim, at 5'10" in height; and minor weighed 40 pounds more than the victim, at 170 pounds.

After the victim reported the incidents to his mother, she confronted minor and his father. Minor's father did not believe the victim and told minor to "beat up" the victim for lying. Minor hit the victim in the face and arms; he also hit the victim's mother, who was attempting to shield her son. The victim and his mother ran out of the house and called police.

After speaking with the victim, the police spoke with minor. After being read his *Miranda* rights, minor admitted that he had committed the alleged offenses. Minor told the officers that he forced the victim to perform the sexual acts; he knew he was hurting the victim. Minor admitted telling the victim not to tell anyone about the assaults. Minor told police his belief that he committed the offenses because of the television shows he watched and because his body was "acting weird"; he felt like he "had to do it."

During the interview with the probation officer, minor again admitted committing the three offenses the victim had reported. Minor admitted watching pornography on his gaming system. He admitted remorse for his acts, but that it was "just a mistake." The

probation officer indicated in his report that the “unknown origin of the youth’s sexual deviancy [was] troublesome and pose[d] a continued danger to others.”

DISCUSSION

A. PROBATION TERM NOS. 6, 23, 27, AND 28

Minor challenges four of his probation conditions as either unreasonable or unconstitutionally vague and overbroad.

1. *ADDITIONAL PROCEDURAL HISTORY*

Following a contested dispositional hearing, the juvenile court ordered minor to complete formal probation. At the hearing regarding minor’s probation, the court imposed various terms and conditions. On appeal, minor challenges Probation term Nos. 6, 23, 27 and 28.

Probation term No. 6 states: “The minor shall [¶] . . . [¶] [n]ot be on any school campus unless enrolled there or attending a sanctioned school activity or with prior administrative permission from school authorities.” Minor’s counsel objected to term No. 6 because the offense did not occur at a school, so he did not “believe there [was] a nexus.” The court indicated it ordinarily agreed that a probation term restricting a minor’s access to schools was inappropriate. But here, the court determined the probation condition was appropriate because minor’s crimes involved young children, and allowing minor access to schools would set him “this minor up for failure.” Therefore, the court overruled the objection and imposed term No. 6.

The probation report also recommended term No. 23, which read “The minor shall [¶] . . . [¶] [n]ot associate with (persons/females/males) he/she knows or reasonably should know are under the age of thirteen (13), unless in the presence of a responsible adult who is aware of the nature of his/her background and current offense, and who has been approved by the probation officer.” Defense counsel objected to the age limit because it was not connected to the victim’s age. He also objected to the requirement that the responsible adult know of minor’s background and offense, and that the contacts had to be approved by probation. The court partially agreed with defense counsel and struck the portion of term No. 23 after “responsible adult,” eliminating the requirement that the adult know of minor’s background and that the contact be approved by probation.

The court also imposed term Nos. 27 and 28, which related to minor’s use of the Internet. Term No. 27 required that “The minor shall [¶] . . . [¶] [h]ave NO internet access, unless in the direct supervision of parent or school official.” Term No. 28 prohibited minor’s access to any social media networking sites and prohibited minor from maintaining a social media networking site account. Counsel objected to term Nos. 27 and 28 on First Amendment grounds. The court overruled the objection and imposed both terms.

2. *LEGAL BACKGROUND*

When a minor is made a ward of the juvenile court and placed on probation, the court “may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.” (Welf. & Inst. Code, § 730, subd. (b).) “ ‘In

fashioning the conditions of probation, the . . . court should consider the minor’s entire social history in addition to the circumstances of the crime[s].’ ” (*In re R.V.* (2009) 171 Cal.App.4th 239, 246.) The court has “broad discretion to fashion conditions of probation.” (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5.)

“A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) “The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind . . . that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) Moreover, as a juvenile, minor is “deemed to be more in need of guidance and supervision than adults, and [his] constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents [and] may ‘curtail a child’s exercise of constitutional rights.’ ” (*In re Antonio R.* (2000) 78 Cal.App.4th 937, 941; see *In re Binh L.* (1992) 5 Cal.App.4th 194, 204 [the United States Supreme Court has long recognized the state has broader authority to regulate the activities of children than of adults].)

As to conditions challenged as unconstitutionally vague, “the underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders.’ ” (*Sheena K., supra*,

40 Cal.4th at p. 890.) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness.” (*Ibid.*) We review constitutional challenges to probation conditions de novo. (*In re J.B.* (2015) 242 Cal.App.4th 749, 754.)

Moreover, a condition of probation will be upheld unless it has no relationship to the crime of conviction, relates to conduct that is not itself criminal, and requires or forbids conduct that is not reasonably related to future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*)). The *Lent* test is conjunctive, and all three conditions must be met before a condition can be invalidated. (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*)). For guidance we look to the abuse of discretion standard set forth by the California Supreme Court for adult probationers, which found a probation condition valid if it “is reasonably related to the crime of which the defendant was convicted or to future criminality.” (*People v. Lent, supra*, 15 Cal.3d at p. 486; *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084.) Furthermore, probation conditions are given “ ‘the meaning that would appear to a reasonable, objective reader.’ ” (*In re I.V.* (2011) 11 Cal.App.5th 249, 261.)

3. PROBATION TERM NOS. 6 AND 23

Probation term No. 6 restricts minor’s access to schools. Specifically, it prohibits minor from being on any school campus unless he is enrolled as a student at the school, attending a sanctioned school activity, or has administrative permission from school authorities. At the hearing below, minor’s counsel argued that the term was unreasonable

because there was no nexus between school campuses and minor's offense. On appeal, minor contends that the term gives unfettered discretion to school administrators, is vague or overbroad because it makes even "innocent entry onto school premises" a violation of probation, and thus, would regulate lawful behavior in a manner that is not related to preventing minor from engaging in unlawful conduct. Minor also claims that term No. 6 is invalid under *Lent* because it has no relationship to minor's crime, relates to conduct not itself criminal, and is not reasonably related to future criminality.

Probation term No. 23 prohibits minor from associating with children he knows or reasonably should know are under the age of 13, unless a responsible adult is present. Minor objected to the age limit below, arguing that it was not tied to the age of his victim.⁴

As to term No. 6, the People argue that, because minor's only objection below was that term No. 6 was not related to his crime, only the *Lent*-related claims have been preserved for appeal. We need not address the People's forfeiture argument because minor's claims fail on the merits.

First, the trial court expressly concluded that term No. 6 was valid under the *Lent* factors, and we agree. The court noted the term is related to minor's offense in that it restricts his access to children; his victim was a young child. Moreover, it is reasonably related to future criminality in that the term is aimed at preventing similar offenses in the

⁴ As discussed *ante*, minor's additional objection below, regarding giving notice to adults of his background and offense, was sustained; the court struck that language from the probation term.

future. As the court noted, the term was necessary so they did not “set this minor up for failure.” Having failed two of the three conditions under *Lent*, term No. 6 is valid under *Lent*. (*Olguin, supra*, 45 Cal.4th at pp. 379-380.) The trial court did not abuse its discretion in imposing term No. 6.

Additionally, as to term No. 23, minor contends the term is unconstitutional because it does not include a knowledge requirement. The term does, in fact, include a knowledge requirement. It reads, “The minor shall [¶] . . . [¶] [n]ot associate with (persons/females/males) *he/she knows or reasonably should know* are under the age of thirteen (13), unless in the presence of a responsible adult.”

Next as to term Nos. 6 and 23, minor argues that the terms “are unconstitutionally overbroad because they place unfettered discretion in the hands of third parties including school authorities and unknown ‘responsible adult[s].’ ” We disagree. The challenged terms are sufficiently precise to inform minor what is required of him and to allow the court to determine when a violation has occurred. (*In re Jason J.* (1991) 233 Cal.App.3d 710, 719, overruled on other grounds in *People v. Welch* (1993) 5 Cal.4th 228, 237.)

As to term No. 6, the term clearly states that minor may not access any school campus unless he is an enrolled student at the school, attending a sanctioned school activity, or has administrative permission from school authorities. The term clearly indicates that minor can be on his own school campus at any time without violating his probation, he can also be on another school campus as long as he is there to attend a school-sanctioned activity. Moreover, in the event minor needed to be on a school campus that is not his own school or for a school-related activity, he would need

administrative approval. In light of minor's offenses involving a nine-year-old victim, the limit on minor's access to schools—there are many potential victims—is entirely reasonable. Term No. 6 is specific and clear.

As to term No. 23, the term clearly prohibits minor from associating with children he knows or reasonably should know are under the age of 13, unless a responsible adult is present. Despite minor's argument that this term gives "unfettered discretion" to third parties, all this term requires is that a responsible adult be present when minor is in the presence of children under the age of 13. Again, in light of minor's offenses involving a young victim, prohibiting minor from associating with children under the age of 13 without adult supervision is not only appropriate and reasonable, it is a necessity to protect the safety of young children.

Minor also argues that term No. 23 is overbroad because it "prohibits [minor] from residing with people close to his own age, as well as potentially his close family members such as siblings or cousins." There is nothing in term No. 23 that restricts minor from residing with children under the age of 13. The term does, however, restrict his access to children residing in his home by requiring a responsible adult to be present. Here, minor used the privacy of his own home to commit the offenses against a frequent nine-year-old visitor to the home. Protection of any other children in minor's home is not only reasonable, it is necessary. Minor should not be allowed unsupervised access to any children under the age of 13.

4. *PROBATION TERM NOS. 27 AND 28*

Minor challenges term Nos. 27 and 28. Term No. 27 restricts his Internet access by requiring that his access be supervised by a parent or school official, and term No. 28 prohibits minor from accessing social media networking sites and maintaining accounts for any such social media sites. Below, minor objected to term Nos. 27 and 28 on First Amendment grounds. The court overruled the objection and imposed the terms as indicated. On appeal, minor again contends that the terms impermissibly infringe on his constitutional rights to speech, association, and privacy. Minor also argues that the terms are invalid under *Lent*.

a. Probation Term No. 27

As noted above, term No. 27 restricts minor's Internet access by requiring that his access be supervised by a parent or school official. Under the facts of this case, the restrictions on minor's Internet access are not unconstitutional. As the juvenile court noted, the crimes were sexual crimes. Minor told police that he thought he committed the offenses because of the shows he watched and said, his body was "acting weird" and he felt like he "had to do it." He also admitted that he watched pornography on his gaming system. He admitted committing the offenses and claimed he was sorry. He, however, told his probation officer that it was "just a mistake." As the probation officer noted, the "unknown origin of the youth's sexual deviancy [was] troublesome and pose[d] a continued danger to others." Based on these facts, the court permissibly restricted minor's access to the Internet. The restrictions were particularly appropriate given minor's failure to appreciate the gravity of his conduct, and his inability to identify the

reasons for committing the crimes. Moreover, minor's Internet use is permissible as long as it is supervised. Therefore, term No. 27 is constitutional.

b. Probation Term No. 28

Term No. 28 prohibits minor from accessing social media networking sites and maintaining accounts for any such social media sites. We agree with minor that this term is unconstitutional as written.

“A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.” (*Packingham v. North Carolina* (2017) 582 U.S. ____ [2017 U.S. LEXIS 3871, ***9] (*Packingham*).) An important forum for such communication today is found on social media, and “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.” (*Id.* at ***15.) In *Packingham*, in light of social media's role in protected communication, the United States Supreme Court struck down a state law prohibiting registered sex offenders from gaining access to social media websites. (*Id.*, at ***4, ***17)

In a recent case, *In re L.O.* (2018) 27 Cal.App.5th 706 (*L.O.*), the minor challenged a similar probation condition that prohibited him from gaining access to or using any social networking site. The appellate court noted that “[i]n the early days of social media, a prohibition on using social networking sites may have passed constitutional muster [citation], but *Packingham* announces that day has passed.” (*Id.* at p. 713.) Similar to this case, the probation condition in *L.O.* also involved a juvenile probation condition, and not a constrain on adult behavior. Although juvenile courts

enjoy broader discretion in fashioning probation terms than adult criminal courts do, “that discretion is not unlimited.” (*Ibid.*) “*Sheena K.* requires that a probation condition limiting a juvenile’s constitutional rights be closely tailored to the purpose of the condition [citation], and this term of probation makes no pretense of tailoring.” (*Ibid.*)

The court in *L.O.*, however, found that “[w]ith a small adjustment, . . . the prohibition on Minor using social media can be sufficiently tailored to survive a facial challenge.” (*L.O.*, *supra*, 27 Cal.App.5th at p. 713.) The court found that the probation condition would pass constitutional muster if minor’s access to or participation in social media sites was monitored by the probation officer. The court wrote that “[a]s long as Minor’s probation officer has the authority to allow social media use that is consistent with the state’s compelling interest in reformation and rehabilitation, that probation condition is not facially overbroad.” (*Ibid.*)

We agree with the analysis in *L.O.* Therefore, we find that probation term No. 28’s prohibition on accessing all social media sites violates the constitution. (See, *Packingham*, *supra*, 2017 U.S. LEXIS at ***4, ***17.) However, as in *L.O.*, we shall modify probation term No. 28 to include a limitation, as follows: “NOT to access ANY social networking site or maintain an account, without the express permission of the probation officer.”

Minor also argues that “under *Lent*, neither the use of the Internet nor social media has any relationship to the crime of which the minor was adjudicated. Neither the use of social media nor the internet relates to conduct which is in itself criminal. Lastly, forbidding internet use or access to social media forbids conduct which is not reasonably

related to future criminality.” We disagree. Here, as noted above, defendant believed that he committed the crimes based on shows he watched on television and on porn watched on his gaming system. Limiting Internet use to supervised use by a parent or school official would limit his access to content that could encourage the same types of behaviors in the future. Since the *Lent* test is conjunctive, and the third condition has not been met, the terms are valid. (*Olguin, supra*, 45 Cal.4th at pp. 379-380.)

B. PROBATION TERM NO. 26 IS VALID

Minor contends that the juvenile court erred in imposing term No. 26, which required minor to submit to an HIV antibody test.⁵ Minor argues that the term is invalid because (1) the order was unauthorized because he was not convicted of an enumerated offense and the court lacked jurisdiction to order him to submit to an HIV test; and (2) even if the court could have ordered the test, the order was not supported by substantial evidence. We disagree.

In this case, minor objected to the imposition of term No. 26 because he admitted a violation of section 243.4, which is not an enumerated offense in the Penal Code that permits HIV testing to be ordered. The court reserved ruling on the objection and set a briefing schedule and further hearing. After minor filed a written motion objecting to term No. 26, the court considered the matter; it overruled minor’s objection. The court filed a written ruling detailing its findings and the reasons in support of its order.

⁵ Term No. 26 also requires minor to complete an AIDS education program. Minor does not challenge this portion of the term.

Section 1202.1, subdivision (a), provides that testing for HIV antibodies is automatically required when a defendant or ward is convicted of certain crimes, including sodomy (§ 286) or oral copulation (§ 288a). (§ 1202.1, subds. (a), (e)(1)-(5).) For certain other offenses, including violations of section 288, the testing is required only when “the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.” (§ 1201.1, subd. (e)(6)(B).)

The standard of probable cause here is an objective one: “Probable cause is an objective legal standard—in this case, whether the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.” (*People v. Butler* (2003) 31 Cal.4th 1119, 1127.)

Minor argues that the juvenile court had no authority to order the HIV test because he was not adjudged a ward of the court for a violation of an enumerated offense. Here, minor admitted a violation of section 243.4, sexual battery of a restrained victim. The People agree that section 243.4 is not an enumerated offense under section 1202.1. The People, however, contend that pursuant to minor’s plea agreement, minor agreed that the court could consider the dismissed counts for purposes of disposition. The dismissed counts included four alleged violations of section 288, which is an enumerated offense under section 1202.1. (§ 1201.1, subd. (e)(6)(A).) Minor’s agreement that the court

could consider the dismissed section 288 counts is the functional equivalent of a *Harvey*⁶ waiver. The court acknowledged this during the hearing:

“The agreement was, through a plea agreement, the minor was supposed to admit to Count 5. The original counts 1 and 4, all felonies, to be dismissed and discussed. The term ‘dismissed and discussed’ is the functional equivalent of a *Harvey* waiver in adult court, which means that this Court and probation can still consider those dismissed charges for purposes of determining victim restitution and sentencing. The court cannot and will not pretend Counts 1 and 4 did not happen.”

Traditionally, a plea bargain includes an implicit understanding that “the defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, the dismissed count.” (*People v. Harvey, supra*, 25 Cal.3d at p. 758.) But, where a defendant or juvenile ward agrees to a *Harvey* waiver, that waiver permits the sentencing judge to consider facts underlying dismissed counts, and therefore, the defendant or minor agrees that he can suffer adverse sentencing consequences based on the dismissed counts. (*Ibid.*)

Therefore, in this case, the juvenile court had the authority to consider the facts underlying the dismissed section 288 counts when imposing conditions of minor’s probation. Under section 1202.1, the dismissed section 288 charges could authorize an order for HIV testing if the court made the necessary probable factual finding.

⁶ *People v. Harvey* (1979) 25 Cal.3d 754, 758.

Minor contends that the record does not contain sufficient evidence to support the court's probable cause finding. Specifically, minor contends that the juvenile court "failed to cite any facts to support its conclusion there existed probable cause to believe there had been a transmission of bodily fluids such as blood or semen between appellant and the victim." We disagree with minor. Here, in the court's written ruling on minor's motion, the court expressly concluded the facts of the underlying offenses established "sufficient probable cause to order the minor to submit to an HIV test." The court noted that the first incident involved minor's forceful insertion of his penis into the victim's anus. Minor then moved his penis back and forth for two minutes. The second and third incidents involved minor's forceful insertion of his penis into the victim's mouth, again for approximately two minutes. In any or all of these incidents, semen could have been transferred from minor to the victim. The court reiterated these findings during the hearing on the issues.

Accordingly, because "the facts known would lead a person of ordinary care and prudence to entertain an honest and strong belief that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim," the juvenile court was authorized to order minor to submit to HIV testing under section 1202.1. (*People v. Butler, supra*, 31 Cal.4th at p. 1127.) The court noted, and we agree, that "[b]ased upon this evidence, the court finds sufficient probable cause to order the minor to submit to an HIV test. The victim has the right to know if [he] has incurred a deadly sexually transmitted disease based on the minor's criminal acts."

DISPOSITION

Probation term No. 28 is modified to state: “NOT to access ANY social networking site or maintain an account, without the express permission of the probation officer.” In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER

J.

We concur:

RAMIREZ

P. J.

RAPHAEL

J.